

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**ZEXI LI, HAPPY GOAT COFFEE COMPANY INC., 7983794 ONTARIO INC.,
(c.o.b.) as UNION: LOCAL 613 and GEOFFREY DEVANEY**

Plaintiffs

and

**CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING, JAMES BAUDER,
BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS, CHAD EROS, CHRIS GARRAH,
MIRANDA GASIOR, JOE JANSEN, JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ,
SEAN TIESSEN, NICHOLAS ST. LOUIS, (a.k.a. @NOBODY CARIBOU), FREEDOM 2022
HUMAN RIGHTS AND FREEDOMS, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4,
JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, JOHN DOE 9, JOHN DOE 10, JOHN
DOE 11, JOHN DOE 12, JOHN DOE 13, JOHN DOE 14, JOHN DOE 15,
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JOHN DOE 52, JOHN DOE 53, JOHN DOE 54, JOHN DOE 55, JOHN DOE 56, JOHN DOE 57,
JOHN DOE 58, JOHN DOE 59, JOHN DOE 60, JANE DOE 1 and JANE DOE 2**

Defendants/Mareva Respondents

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM
(of the Mareva Respondents)**

March 9, 2022

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PART I - OVERVIEW

1. At issue in this litigation is whether it was appropriate for a Mareva injunction to have been issued, and if yes, whether it is now appropriate to dissolve the Mareva injunction. A few cases on this issue set out concerns the Courts often raise with respect to Mareva injunctions.

2. In a Mareva injunction extension decision involving a class action, the BC Court of Appeal held on the issue of pre-judgment execution:

46 In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in *Grenzservice Spedition GmbH v. Jans* (1995), [1995 CanLII 2507 \(BC SC\)](#), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (B.C. S.C.), at 755-756 at p. 23:

[Mareva and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

Tracy v. Instalogs Financial Solution Centres (BC) Ltd., [2007 BCCA 481](#) at [para. 46](#)
[Mareva Respondents' List of Authorities, Schedule A, Tab 1](#)

3. Where, on a motion to dissolve an injunction, it appears that the facts as presented are substantially different from the facts upon which the original order was given or have changed so dramatically that the factual underpinnings of the earlier order are no longer valid, the injunction may be set aside.

Jack Digital Productions Inc. v. Comex Foreign Exchange Inc., [2007 CanLII 43901 \(ON SC\)](#), per Himel J. at [para. 7](#) [***Jack Digital Productions***]
[Mareva Respondents' List of Authorities, Schedule A, Tab 2](#)

4. The test on a motion to vacate a *Mareva* order is set out in the case of *Jack Digital Productions*, where the Court considered several factors including:

- (a) whether there has been inordinate delay in advancing the claim;
- (b) harm to the defendant;
- (c) whether the present facts are substantially different from the facts upon which the original order was given; and

(d) the balance of convenience.

Jack Digital Productions, *supra* at [para. 7](#)

5. The guidelines for setting aside a *Mareva* order were summarized in *Northwestpharmacy.com Inc. v. Yates*, [2018 BCSC 41](#), by Mr. Justice Macintosh as follows:

[\[15\]](#) In the set-aside hearing, a court considers whether the *ex parte* order should be set aside because of material non-disclosure by the *ex parte* applicant. If not, the court proceeds to a hearing *de novo* on the merits of the injunction application, where the *ex parte* applicant must again meet the tests for obtaining the injunction, even though that party is the respondent on the set-aside application. . . .

[\[16\]](#) A material fact is one that may affect the outcome of the application. . . .

[\[17\]](#) The applicant in the *ex parte* application must be "profoundly fair", must disclose all important aspects of the evidence, and must avoid opinion and invective. . . .

[\[18\]](#) If a court finds material non-disclosure, it may, and likely will, set aside the *Mareva* order. However, material non-disclosure is relevant as well in the second part of the analysis. The court can take non-disclosure on the *ex parte* hearing into account when it is deciding whether to maintain an existing *Mareva* order, or grant a new one. . . .

[\[19\]](#) The legal analysis, summarized above, is grounded in fairness. The ultimate question is whether it is just or convenient that the injunction be given, or maintained, in accordance with s. 39 of the *Law and Equity Act* . . . "[J]ust or convenient" is perhaps not highly informative in itself. However, it derives from the fact that injunctive relief is equitable. It will only be granted, or maintained, in accordance with principles of fairness.

...

[\[22\]](#) In considering the matter *de novo*, I may consider all of the submissions and evidence before me to decide whether the injunction should have been granted and whether it should be continued: *Bank of Credit and Commerce International Overseas Ltd. v. Akbar*, [2001 BCCA 204](#) at paras. [39 and 40](#).

[\[23\]](#) If I conclude there was material non-disclosure at the *ex parte* hearing, I may decide to set aside the *Mareva* Order. However, even if there was material non-disclosure, I retain discretion to maintain the *Mareva* Order in light of evidence presented to me on the application to set aside the *Mareva* Order: *Kerston v. Seyedzadeh*, [2019 BCSC 1330](#) at paragraphs [15 and 16](#).

Northwestpharmacy.com Inc. v. Yates, [2018 BCSC 41](#)
[Mareva Respondents' List of Authorities, Schedule A, Tab 3](#)

PART II – FACTS

6. The facts relied upon by the Mareva Respondents are contained in their affidavits as filed in their Motion Record dated March 8, 2022.

PART III – ANALYSIS

Motions No. 1, 2 and 3

7. The Mareva Respondents consent to the continuation of the Escrow Order of February 28, 2022. The Mareva Respondents oppose the extension of the Mareva injunction. The Mareva Respondents' primary ground for opposing the extension of the Mareva injunction is that there is insufficient risk of dissipation of assets for it to be continued.

Jeana Ventures Ltd. v. Garrow, [2021 BCSC 769](#), para [75 to 84](#)
[Mareva Respondents' List of Authorities, Schedule A, Tab 4](#)

8. The Plaintiffs have advised us in preparation for this motion that they will not consent to the dissolution of the Mareva injunction. Accordingly, a timetable should be scheduled for the hearing of a motion to dissolve the Mareva injunction.

Motions No. 4 and 8

9. The Ministry of the Attorney General has advised this morning that it will transfer the keys of Mr. St. Louis to the Escrow Agent (Motion No. 4). Mr. St. Louis will bring his motion for costs as against the Ministry of the Attorney General at a date to be scheduled. (Motion No. 8)

Motions No. 5 and 6

10. RBC has advised their position in an email provided to the Ministry of the Attorney General. RBC simply requires direction from the Court to transfer funds in Account 5474 (the personal account of Mr. Garrah that received donated funds) to the Escrow Agent, and to remove the hold on Account 8449 (the personal account of Mr. Garrah and his wife). Our submission is that this

Court has jurisdiction to permit this variance, if necessary, to the Restraint Order obtained by the Attorney General.

Motion No. 7

11. In our discussions with the Plaintiffs, they are of the view that Freedom Corp. should issue instructions to GiveSendGo to transfer funds held in the United States under the possession, power and control of GiveSendGo to the Escrow Agent. Freedom Corp. does not agree that it should be compelled to do so. The agreement between GiveSendGo and Freedom Corp. has been frustrated by the fact that Freedom Corp. cannot open a bank account. The agreement between GiveSendGo and Freedom Corp. does not provide that funds should be sent to an Escrow Agent in the event the agreement is frustrated. In any event, even if such an order were issued, Freedom Corp. does not have the power to control what GiveSendGo does in the United States.

Motions 9 and 10

12. The costs the Mareva Respondents seek are properly adjudicated at the conclusion of the Mareva set-aside motion. Further relief may be requested at that motion. For today's purposes, a timetable for this motion should be scheduled with an early return date.

PART IV – ORDERS SOUGHT

13. The Mareva Respondents seek a timetable and a date for their motions.

DATE: March 9, 2022

Respectfully Submitted



Norman Groot
Counsel for the Mareva
Respondents

SCHEDULE “A” – LIST OF AUTHORITIES

Tab	Case Name
1	<i>Tracy v. Instalogs Financial Solution Centres (BC) Ltd.</i> , 2007 BCCA 481
2	<i>Jack Digital Productions Inc. v. Comex Foreign Exchange Inc.</i> , 2007 CanLII 43901 (ON SC)
3	<i>Northwestpharmacy.com Inc. v. Yates</i> , 2018 BCSC 41
4	<i>Jeana Ventures Ltd. v. Garrow</i> , 2021 BCSC 769

ZEXI LI et al.
Plaintiffs

-and- CHRIS BARBER et al.
Defendants

Court File No. CV-22-00088514-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT OTTAWA

Proceedings under the *Class Proceedings Act*, 1992

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